No. 80-1226

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In The

Supreme Court of the United States

October Term, 1980

HENRY STADLER,

Petitioner,

vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Does the Pennsylvania application of the doctrine of estoppel to exhaust administrative remedies effectively preclude a defendant from notice and opportunity to be heard on the merits at every stage of the Pennsylvania proceeding, thereby denying due process of law?

2. Did the Philadelphia Court Rule requiring defendants to provide a Pennsylvania address before the defendant could file any paper prohibit a non-resident from appearing and making a defense, denying such defendants due process of law?

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No.

In The

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October Term, 1980

HENRY STADLER,

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vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

The Supreme Court of New Jersey did not file an opinion with its order denying the petition for certification. The order appears in the appendix hereto as Appendix A. The opinion of the New Jersey Superior Court Appellate Division is unreported. A copy of the opinion appears in the appendix hereto as Appendix B. The opinion of the Burlington County District Court is reported at 164 N.J. Super. 281 (1978) and 395 A. 2d 1300. A copy of the opinion appears in the appendix hereto at Appendix C.

JURISDICTION

The Supreme Court of New Jersey denied a petition for certification on October 21, 1980 (Appendix, 1a). The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution which states as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a resident of New Jersey, is an employee of the federal government on a federal enclave in the City of Philadelphia. The City of Philadelphia assessed its municipal wage tax against Mr. Stadler on the basis of that employment and brought suit in the Pennsylvania courts in an effort to collect the tax. Process was served on the petitioner by certified mail, return receipt requested. Since Mr. Stadler was not a resident of Pennsylvania, he was unable to file an answer under the Philadelphia Rules of Court which required at that time that

the first paper filed by a party must have a Pennsylvania address where papers and notices can be served. For this and other reasons explained below a default judgment was entered.

The City of Philadelphia then sought to enforce the judgment through the New Jersey courts under the Full Faith and Credit Clause of the United States Constitution. The city obtained summary judgment in the Burlington County District Court (Appendix, 5a). That decision was appealed to the New Jersey Superior Court, Appellate Division, which affirmed the lower court decision (Appendix, 4a). The New Jersey Supreme Court denied the petition for certification (Appendix, 1a).

The constitutional issues asserted in this petition were raised in each court below, but were specifically addressed only by the trial court (Appendix, 5a). Each one was rejected by that court.

REASONS FOR GRANTING THE WRIT

I.

The Philadelphia County Rules of Court procedure in effect prior to May 17, 1976, prohibited a non-resident defendant from appearing and making a defense.

The Pennsylvania judgment which respondent seeks to enforce was rendered without procedural due process since a local Rule of Court in effect prior to May 17, 1976, prohibited a defendant whose address was not within the Commonwealth of Pennsylvania from filing papers in his own defense. That rule provided:

> "The first paper filed by a party in a case shall have endorsed thereon an address in the

> Commonwealth at which all papers and notices thereafter may be served upon him, and the prothonotary shall not accept filing unless it contains such endorsement." Rule 306 Pa. R.C.P. (Philadelphia County).

Many New Jersey citizens have in past years attempted to defend themselves in wage tax actions brought in the courts of Philadelphia County. The rule, by its terms, precluded these non-residents, many of whom had been notified of the pending Pennsylvania actions by long arm service in New Jersey, from appearing and defending. This impediment was strengthened and confirmed in 1975-1976 when the Philadelphia City Solicitor's Office wrote *ex parte* to the Presiding Judge and Court Administrator of the Philadelphia Courts, in apparent response to many *pro se* non-resident appearances, requesting that the rule be enforced. Thereafter, Judge David N. Savitt responded on January 7, 1976, as follows:

> "I acknowledge receipt of your letter of December 23, 1975, and the brief which was enclosed. Both Judge Bradley and I believe that Rule 306 should be stringently enforced, and I have so directed the Prothonotary."

During this same period, the City of Philadelphia sought to enforce the rule against actions which had been accepted for filing in non-conformity with Rule 306. *See for example, City of Philadelphia v. Simon,* Phila. Court of Common Pleas, December Term 1976, Docket No. 3805X. The denial of constitutional rights being patent and obvious, the New Jersey Public Advocate sought to intervene *amicus curiae* in the case of *City of Philadelphia v. Gould,* Court of Common Pleas, October Term, 1975, Docket No. 3544X. This issue was decided on other grounds and the constitutional issue was never reached by the

court. However, effective May 1976, the rule was amended in obvious recognition of its previous unconstitutionality. The rule now reads:

> "(1) The first paper filed by a party in a case shall have endorsed thereon an address in the Commonwealth at which all papers and notices thereafter may be served upon him, and the Prothonotary shall not accept any such paper for filing unless it contains such endorsement. Thereafter any party may file with the Prothonotary a suggestion, which shall be noted upon the appearance docket and form part of the record in the case, setting forth a new address in the Commonwealth at which such service may be made.
>
> (2) Any party appearing pro se shall specify on a form to be provided by the Court a reasonable address at which all papers and notices thereafter may be served on him. If the party is not a resident of the Commonwealth, the specified address need not be located in the Commonwealth. The party shall agree on the form provided to accept service of all papers and notices sent by ordinary mail to the address provided by him, in the manner provided in (1) or to any new address later furnished by him by written notice filed of record in the case." Rule 306, Pa. R.C.P. as amended May 17, 1976. *Also cited as* Rule 40-H(1) and (2), Philadelphia Civil Rules.

Upon this background only one conclusion obtains: *Default judgments obtained upon Pennsylvania actions filed prior to*

May 17, 1978, against non-residents do not meet the requirements of due process and should not be enforced. A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *Griffen v. Griffen,* 327 U.S. 220 (1946). These New Jersey residents cannot be held accountable for having failed to file responsive pleadings in actions pending in foreign tribunals when the rules of such tribunals on their face prohibited such filings. The superseded rule having been patently discriminatory and unconstitutional as applied to non-residents cannot form the basis for enforceable foreign judgments.

II.

The Pennsylvania court's application of the doctrine of estoppel to exhaust administrative remedies effectively precludes a defendant from notice and opportunity to be heard on the merits at any stage of Pennsylvania proceeding in violation of due process of law.

The Pennsylvania judgment which respondent seeks to enforce was rendered without an opportunity for the petitioner to be heard before the Pennsylvania courts. The federal constitution does not require states to enforce foreign judgments rendered without notice or opportunity to be heard. *Griffen v. Griffen,* 327 U.S. 220 (1946). Pennsylvania courts have applied a doctrine known as "estoppel to exhaust remedies" in such a way so as to completely bar the assertion of any defense in Philadelphia wage tax enforcement cases. *City of Philadelphia v. Kenny,* 369 A. 2d 1343 (1977). The law of Pennsylvania therefore denies a defendant his fundamental right to be heard in violation of due process of law.

The doctrine of estoppel to exhaust administrative remedies finds expression in Pennsylvania law in the case of

Commonwealth v. Lentz, 44 A. 2d 291 (Pa. Sup. 1945), which held that one who fails to pursue a statutory remedy may not thereafter raise issues which could have been raised by pursuing such remedy. The Pennsylvania courts have applied this doctrine directly to Philadelphia wage tax cases. *City of Philadelphia v. Sam Bobman Department Store,* 149 A. 2d 518 (Pa. Sup. 1959); *City of Philadelphia v. Kenny,* 369 A. 2d 1343 (1977). To understand the unconstitutionality of this doctrine as applied to non-resident defendants, one must understand the basic pre-litigation procedures used by the City of Philadelphia to collect its tax.

The City of Philadelphia transmits tax billings by regular mail to persons it believes are subject to its wage tax but from whom no payment has been received. Although these tax billings are characterized as "assessment notices" by the Pennsylvania court in *Kenny, supra,* no such denomination is made in any Pennsylvania statute or Philadelphia city ordinance. In fact, there exists no authority whatsoever for the mailing of such billings. In so doing the Philadelphia Department of Collections acts gratuitously pursuant to internal policy and outside the mandate of any legislative authority.

However, the Pennsylvania courts have reasoned that the failure of the alleged taxpayer to voluntarily come forward and contest this gratuitous billing before the Philadelphia City Tax Review Board gives rise to an estoppel preventing such putative taxpayers from raising any substantive defenses in later judicial proceedings. *City of Philadelphia v. Kenny,* 369 A. 2d 1343 (1977). In the case of a non-resident this doctrine requires him to voluntarily come forward and subject himself to the jurisdiction of a Pennsylvania tribunal in order to preserve his right to make

a defense.[1] In essence the Pennsylvania courts say to a non-resident: You can make your defenses at the time the State of Pennsylvania has no *in personam* jurisdiction over you but when such jurisdiction is properly obtained (via long arm statute) you are estopped from raising any defenses.[2]

Fair notice of the pendency of an action (or in this case, the availability of a remedy) is required in order to satisfy due process *Pennoyer v. Neff*, 95 U.S. 714 (1877). A foreign court must bring a non-resident actually before it by personal service or must do some act tantamount to achieving that result in

---

1. There can be no doubt that Philadelphia relies upon this doctrine in obtaining its judgments in the case of this petitioner, Paragraph 6 of the Pennsylvania complaint avers:

> "Based on information supplied by the Federal Agency to the Department of Collections of the City of Philadelphia, assessments were made and the defendant was duly notified of such assessments from which the defendant failed to file a Petition for review with the Philadelphia Tax Review Board as permitted under Section 19-1702 of the Philadelphia Code."

2. The City has relied upon this doctrine for many years. Interestingly, Philadelphia asserted this doctrine in several original suits brought in New Jersey in 1975. In an unpublished decision, written by Judge King before his elevation to our Appellate Division, Judge King recognized the jurisdictional question as being one of notice, holding:

> "In view of the failure of proof on the plaintiff's basic contention as to substantive liability, this Court does not reach the question of whether failure to pursue administrative remedies precludes the utilization of affirmative defenses here *assuming taxpayer is on notice* of the availability of the administrative remedy." (Emphasis added). Camden County District Court associated cases: *Philadelphia v. Smith*, #155152; *Philadelphia v. DelRossi*, #155159; and *Philadelphia v. Foster*, #157847.

which case *in personam* jurisdiction is said to be obtained by "substituted service". *Pennoyer, supra.* But it is clearly established in our law that there must be a legislative basis for such substituted service and gratuitous actual notice of a proceeding outside the mandate of any legislative authority is insufficient. *Wuchter v. Pizzuti,* 276 U.S. 13 (1928). In *Wuchter,* the United States Supreme Court held:

> "These cases and others indicate a general trend of authority toward sustaining the validity of service of process, *if the statutory provisions in themselves* indicate that there is reasonable probability that if the statutes are complied with, the defendant will receive actual notice. . ." *Wuchter v. Pizzuti,* 276 U.S. 13, 19 (1928)." (Emphasis added.)

Moreover the statutory basis for such service must be strictly observed. *Smith v. Kincaid,* 249 F. 2d 243 (6th Cir. 1957).

As previously mentioned, no statutory basis in fact exists under Pennsylvania law for substituted service of wage tax "assessment notices" on putative taxpayers.

The Philadelphia Tax Review Board is created by the Philadelphia Home Rule Charter and its duties are not clearly prescribed:

> "The Tax Review Board shall perform such duties as the Council shall from time to time impose on it." Philadelphia Home Rule Charter, Section 6-207.

Provisions of Philadelphia ordinances likewise offer no guidance regarding the form and manner of serving assessment notices.

The Code provides simply:

> "Every petition for review of any decision or determination relating to the liability of any person for any unpaid money or claim collectible by the Department of Collections including, but not limited to, any tax, water or sewer rent, license fee or other charge, and interest and penalties thereon, shall be filed with the Tax Review Board within 60 days after the mailing of a notice of such decision or determination to the petitioner." Philadelphia City Code, Section 19-1702.

The Pennsylvania long arm statute is likewise inapplicable to any form of notice other than court process and it is clear that service of these "assessment notices" is never made in compliance with such statute. 42 Pa. C.S.A., Section 8307.

While it is clear that the federal Constitution requires New Jersey courts to honor judgments rendered by other states, this obligation is not absolute and is subject to many constitutional and public policy exceptions. U.S. Const. Art. 4, Section 1; Restatement of Confl. of Laws, 2d, Sections 103, 105, 110, 115, 118 and 120. Primary among such exceptions is the rule that a judgment rendered without adequate notice or opportunity to be heard will not be recognized or enforced in other states. *Griffen v. Griffen,* 327 U.S. 220 (1946). The New Jersey courts have held that a party is denied the opportunity to be heard "when the affected party has not the means of knowing what evidence is offered or considered and is not afforded an opportunity to test, explain or refute it." *Hyman v. Muller et al.,* 62 A. 2d 221 (1948).

The right to be heard is fundamental to our system of law and due process is violated whether the impediment to a full and

fair hearing arises from court rule, substantive law or the fraud of a party. In *Griffen v. Griffen, supra,* a state procedure whereby arrearages in alimony payments were entered automatically as a judgment upon *ex parte* motion was declared violative of due process. Similarly, in a very old case, the Supreme Court of Missouri refused to extend full faith and credit to a "Judgment" entered under an Indiana statute which permitted the Clerk of the Court to file a replevin bond which thereupon was to be "considered as and have the same force and effect as a Judgment" reasoning:

> "The question involved in this cause is not what faith and credit shall be given to a judicial proceeding of a sister state, ... Indeed if this is a judicial proceeding it is difficult to find a reason why a state may not declare any contract or undertaking, on being filed with the clerk of a court of record, a Judgment by confession and having the force and effect of a Judgment and thus make it a judicial proceeding within the meaning of the Federal Constitution." *Foote v. Newell,* 29 Mo. Reports 400 (1860).

Of importance to this issue is the generally accepted concept that in tax matters a lesser standard of notice and hearing may be employed without offending due process. 3 *Cooley on Taxation* (4th Ed.), Section 1118. But it is submitted that the observation of the Minnesota Supreme Court that "it has never been held that a personal Judgment may be obtained in a tax proceeding without personal notice" must surely be the law of every state and indeed is a constitutional imperative. *State v. Security National Bank,* 173 N.W. 885, 887. Professor Cooley suggests that due process does not require notice and hearing at any particular stage of the proceedings "if notice or opportunity to be heard exists before the amount is finally determined or in

subsequent proceedings for . . . collection." 3 *Cooley on Taxation* (4th Ed.), Section 1118. But, in fact, no provision for notice is made under Pennsylvania law before a non-resident can contest the amount of the Philadelphia tax. To permit the entry of a wage tax judgment in Pennsylvania summarily without any right to assert defenses is in essence allowing such judgments to enter automatically in violation of due process.

Only two reported cases have ever directly faced the full faith and credit questions in connection with the enforcement of foreign tax judgments "automatically entered." In *State Tax Commission of Utah v. Cord,* 404 P. 2d 422 (1965), the Nevada Supreme Court considered enforcement of a Utah income tax judgment which was entered automatically upon the filing of an "income tax warrant" under Utah law. On an alternative theory of recovery, the Utah Commission sought enforcement of the underlying tax warrant as a "record" entitled to full faith and credit. After finding that the defendant's contacts with Utah were insufficient to permit the assertion of jurisdiction over their persons under Utah law, the court held:

> "The appellant contends that the warrant judgment imposing personal liability on the Cords is a public record of Utah which must be given full faith and credit. We will not enforce a personal liability imposed by another state on a resident of our state without jurisdiction over him simply because the imposition of liability is called a record and not a judgment. The jurisdictional requirements must be met whether the matter is regarded as a 'judicial proceeding' or a 'record'." *State Tax Commission v. Cord, supra* at 424.

Similar factual circumstances were faced by the Michigan

Supreme Court in *State of Ohio, Department of Taxation v. Kleitch Bros., Inc.*, 98 N.W. 2d 636 (1959). There the State of Ohio sought to enforce a judgment for highway use taxes which was entered statutorily as a matter of course upon the *ex parte* application of the Ohio Department of Taxation. The court found that the judgment was entitled to full faith and credit and noted at length that the assessment procedure which preceded the summary entry of judgment provided for service of the assessment upon the Ohio Secretary of State and service by registered mail upon the taxpayer. The form of the assessment notice was in the nature of a summons containing a demand for payment and full details on the taxpayer's right to file a petition for reassessment. Thus, the procedure was based in statute and was calculated to give the defendant notice of pending proceedings. The court relied heavily upon *People v. Skinner*, 155 P. 2d 488, a case of similar effect only concerning the intrastate enforcement of taxes, and significantly it adopted the following language:

> "From all the authorities, it is evident that the state has the power to assess taxes and fix methods for the collection thereof, and it does not matter if these remedies be summary in their nature, so long as the taxpayer is in some way, at some stage of the proceedings given an opportunity to be heard and have his rights determined before some competent tribunal . . . . The statute provides for adequate notice of any additional assessment and an opportunity for mistakes to be rectified upon the filing of a petition within the time prescribed . . . . *Ohio v. Kleitch*, supra, at 642."

The New Jersey Supreme Court has recognized that due

process requires a hearing in tax matters at some stage of the proceedings. *N.Y. Susquehanna v. Vermeulen,* 44 N.J. 491 (1965).

Applying these principles to the case at bar, it is clear that no such notice and opportunity was provided by the City of Philadelphia to the petitioner. Many substantive defenses exist which could be asserted by tax defendants. For example, traveling employees are entitled to allocate their time between time spent within and without the City of Philadelphia. Often wage records are inaccurately reported, misread, or confused. But the respondent City of Philadelphia would have New Jersey courts enforce judgments resulting from such offensive procedures even though the petitioner has no opportunity to make such meritorious defenses at any stage wherein he jurisdictionally is before the foreign tribunal. It is respectfully submitted that the instant judgment is not entitled to enforcement and violates the right to due process.

CONCLUSION

Although this petition is filed on behalf of only one person, the issues it presents affect thousands of New Jersey residents who commute to a place of employment in the City of Philadelphia.

Petitioner respectfully requests that this Court grant certiorari in order that the important due process rights of these interstate commuters can be adequately protected.

Respectfully submitted,

s/ George J. Botcheos

LASKIN & BOTCHEOS
Attorneys for Petitioners

APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
C-126 SEPTEMBER TERM 1980

Filed Oct. 21, 1980

CITY OF PHILADELPHIA,

Plaintiff-Respondent,

v.

HENRY H. STADLER, SALVATORE DiMARTINO, JOSEPH A. SULPIZIO, JAMES SPROULES and JAMES M. McCULLOUGH, JR.,

Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1742-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1980.

s/ Stephen W. Townsend
Clerk

Appendix A

/tsg

A TRUE COPY
s/ Stephen W. Townsend
Clerk

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1742-78

CITY OF PHILADELPHIA,

Plaintiff-Respondent,

v.

HENRY H. STADLER, SALVATORE DiMARTINO, JOSEPH A. SULPIZIE, JAMES SPROULES and JAMES M. McCULLOUGH, JR.,

Defendants-Appellants.

Argued: April 1, 1980 — Decided: Apr. 18, 1980

Before Judges Fritz, Kole and Lane.

On appeal from Burlington County District Court whose opinion is reported at 164 *N.J. Super.* 281 (1978).

William S. Ruggierio argued the cause for appellant (Ruggierio & Freeman, attorneys).

Charles Crabbe Thomas argued the cause for respondent.

PER CURIAM

Appendix B

We affirm the judgment essentially for the reasons given in Judge Wells' published opinion. *City of Philadelphia v. Stadler,* 164 *N.J. Super.* 281 (Cty. D. Ct. 1978). *See also, City of Philadelphia v. Smith,* ____ *N.J.* ____ (April 2, 1980), aff'g 169 *N.J. Super.* 156 (App. Div. 1979).

We find no merit to any of the contentions raised on this appeal as grounds for reversal.

Affirmed.

A TRUE COPY

s/ Elizabeth McLaughlin
Clerk

APPENDIX C — OPINION OF BURLINGTON COUNTY COURT

BURLINGTON COUNTY COURT, 1978

164 N.J. Super. City of Philadelphia v. Stadler.

CITY OF PHILADELPHIA, PLAINTIFF, v. HENRY H. STADLER, DEFENDANT.

CITY OF PHILADELPHIA, PLAINTIFF, v. SALVATORE DIMARTINO, DEFENDANT.

CITY OF PHILADELPHIA, PLAINTIFF, v. JOSEPH A. SULPIZIE, DEFENDANT.

CITY OF PHILADELPHIA, PLAINTIFF, v. JAMES SPROULES, DEFENDANT.

District Court
Burlington County

December 11, 1978.

Mr. Charles Crabbe Thomas, attorney for plaintiffs.

Mr. William S. Ruggierio, attorney for defendants.

WELLS, J.S.C. These four cases consolidated for hearing and decision are before the court on plaintiff's motion for summary judgment. Plaintiff City of Philadelphia (city) seeks New Jersey judgments based upon judgments against each defendant entered in the Court of Common Pleas, Trial Division, of the County of Philadelphia, State of Pennsylvania, pursuant to the Full Faith and Credit Clause, *U.S. Const., Art. IV,* §1. Defendants resist, asserting various constitutional defenses. The undisputed facts are:

Appendix C

Since 1939 the city has levied a tax upon wages earned by persons working within the County of Philadelphia, *Philadelphia Pa. Code,* §19-1500 (1973). This tax, known as the wage and net profit tax (hereinafter wage tax), is a self-assessed tax which places the responsibility of filing a return upon the taxpayer. In these actions defendant taxpayers are residents of the State of New Jersey who are employed by the Federal Government on federal enclaves inside the boundaries of Philadelphia.[1] The defendants refused to file the necessary forms or pay the assessed taxes.

In each case suits alleging the resultant tax deficiency against such defendant were filed in the Court of Common Pleas of Philadelphia County and served upon defendants under the Pennsylvania Long-Arm Statute, 42 *Pa. C.S.A. §8301 et seq.,* by serving the Secretary of the Commonwealth and defendants at their last known address by certified mail, return receipt. The records of the Pennsylvania proceedings before this court show that all the addresses were to communities within Burlington County and that in three cases the certified mail went unclaimed and that one was refused. After defendants failed to answer, appear or otherwise defend, the city moved to enter judgments by default for failure to plead. Notices pursuant to *Pennsylvania R.C.P.* 2082 were sent to each defendant by certified mail, return receipt requested notifying them that default judgments would be entered within 20 days of the mailing of the notice. Once again defendants either refused delivery of the letter or it went unclaimed. Following expiration of the 20-day period without response from defendants, judgments were entered in favor of the city. These New Jersey actions on the aforesaid Pennsylvania judgments followed.

---

1. The United States, unlike other employers, pursuant to 5 *U.S.C.A.* §5520 does not withhold the taxes from certain of its employees' wages.

Appendix C

[1-3] Defendants argue on various grounds that the judgments entered by the courts of the Commonwealth of Pennsylvania are not entitled to full faith and credit. *U.S. Const., Art. IV,* §1. Generally, the Full Faith and Credit Clause requires every state to give at least the *res judicata* effect which the judgment would be accorded in the state which rendered it. *Duke v. Durfee,* 375 *U.S.* 106, 109, 84 *S. Ct.* 242, 11 *L. Ed.* 2d 186 (1963). However, it is a well established constitutional principle that a judgment entered without due process of law is not entitled to full faith and credit and may not be enforced even as a matter of comity. *Griffin v. Griffin,* 327 *U.S.* 220, 228-229, 66 *S. Ct.* 556, 90 *L. Ed.* 635 (1946); See also, *Restatement, Conflicts* 2d, §104 at 315 (1969). Thus, a court of this State, when asked to enforce a foreign state judgment, must deny full faith and credit if the rendering court lacked *in personam* jurisdiction, *Duke v. Durfee, supra,* 375 *U.S.* at 106, 84 *S. Ct.* 242, 11 *L. Ed.* 2d 186; subject matter jurisdiction, *James v. Francesco,* 61 *N.J.* 480, 485 (1972); *Klaiber v. Frank,* 9 *N.J.* 1 (1952), or failed to provide adequate notice and an opportunity to be heard. *National Exchange Bank v. Wiley,* 195 *U.S.* 257, 25 *S. Ct.* 70, 49 *L. Ed.* 184 (1904); *Griffin v. Griffin, supra.* Defendants assert that the judgments recorded in the Commonwealth courts were entered without due process. *U.S. Const.* Amend XIV. The primary issues may be summarized as follows:

1. Did lack of notice to defendants of their rights to administrative review prior to the filing of the suits in Pennsylvania, combined with the probable application in Pennsylvania of its doctrine of exhaustion of remedies, deprive defendants of an effective right to be heard within the Commonwealth of Pennsylvania?

2. Did the application of *Rule* 306, *PA. R.C.P. (Philadelphia County),* amended May 17, 1976, also cited as *Rule* 40-H(1) and (2), *Philadelphia Civil Rules,* operate to deny defendants the effective opportunity to appear and defend in the Pennsylvania courts?

3. Did defendants have sufficient minimal contacts in Pennsylvania for its courts to render *in personam* judgments against them grounded upon service outside Pennsylvania under the Pennsylvania Long Arm Statute?

4. Does New Jersey public policy preclude the entry of judgments in these cases?

[4] Addressing the first issue, defendants argue that the default judgments were entered in violation of their due process rights since they never received notice in the form of tax bills or assessment notices of their right to appeal to the Philadelphia Tax Review Board, an administrative agency in which all taxpayers must "exhaust any remedy" prior to either prosecuting or defending any action in court relative to the tax.[2] See *Philadelphia v. Kenny,* 28 *Pa. Cmwlth.* 531, 369 *A.2d* 1343 (Cmwlth. Ct. 1977), *cert.* den. 434 *U.S.* 1025, 98 *S. Ct.* 754, 54 *L. Ed.* 2d 774 (1977).

2. This argument is quite different than that first asserted at argument on the motion. Then defendants virtually conceded receipt of delinquent tax bills on the back of which was printed a statement of appeal rights to the Philadelphia Board of Tax Review, and contended that such notice was not statutorily authorized and hence invalid as notice. Compare *Wuchter v. Pizzutti,* 276 *U.S.* 13, 48 *S. Ct.* 259, 72 L. Ed. 446 (1928), with *Juzek v. Hackensack Water Co.,* 48 *N.J.* 302 (1966), and *Jersey City v. Div. of Tax Appeals,* 5 *N.J. Super.* 375 (App. Div. 1949), *aff'd* 5 *N.J.* 433 (1950). The court need not now reach that argument since defendants have shifted their factual position to one of denial that they received the tax bills. They also seek to take depositions on the issue. In view of the determination herein, depositions are unnecessary and such leave is denied.

Appendix C

The court is not satisfied that defendants have the right to complain that they did not receive such notice. The complaints filed in the actions before the Pennsylvania courts specifically alleged that such notices had been given.[3] Thus each of the defendants, had they chosen to receive the complaints served on them, would have been apprised that the city took the position that a notice of the right to an administrative remedy had been given. Defendants could then, in the Pennsylvania actions, have specifically denied that such notice had been sent and put the city to its proofs on the issue of notice of the availability of administrative review. Such notice is important to defendants since they argue that the doctrine of exhaustion of remedies, as applied in Pennsylvania, would have precluded them from a right to be heard on the merits within the Commonwealth of Pennsylvania, and cite the case of *Philadelphia v. Kenny, supra.* However, that case is clearly distinguishable. Although in *Kenny* the court did apply the doctrine of exhaustion of remedies, the issue of the mailing of the notice of administrative review was not disputed. No case shown to this court indicates that Pennsylvania would apply the doctrine of exhaustion of remedies if it found, in fact, that defendants' had not received notice of the administrative remedy they were obliged to pursue.

[5] Defendants next argue that *Rule* 306, *Pa. R.C.P.* (Phila. Cty.), amended May 17, 1976, also cited as *Rule* 40-H(1)

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3. Paragraph (6) states:

> Based on information supplied by the Federal Agency to the Department of Collections of the City of Philadelphia, assessments were made and the Defendant was duly notified of such assessments from which the Defendant failed to file a Petition for Review with the Philadelphia Tax Review Board as permitted under Section 19-1702 of The Philadelphia Code.

and (2), *Philadelphia Civil Rules* precluded the defendants in these actions from appearing in the courts of the Commonwealth. The rule, before its amendment, provided as follows:

> The first paper filed by a party in a case shall have endorsed thereon an address in the Commonwealth at which all papers and notices thereafter may be served upon him, and the Prothonotary shall not accept filing unless it contains such endorsement.

In *Buckley v. Huston,* 60 *N.J.* 472 (1972), the court ruled that a common law right existed in favor of a foreign municipality to sue in the courts of New Jersey to collect the very tax here at issue. Although in a different procedural posture, this reader fails to discern in that opinion any expression of policy which would prevent enforcement of a foreign judgment. If the policy of New Jersey permits the filing of original suits in its courts for the collection of the tax, it seems highly unlikely, and this court refuses to so hold, that this same policy would cause a court of New Jersey to deny full faith and credit to a sister state's judgment.

[11] In a like vein, defendants argue that the assessment of a penalty and interest for failing to timely satisfy the tax obligation is a penal law not entitled to full faith and credit. Again reliance is placed on *Buckley v. Huston, supra,* where our Supreme Court chose not to eliminate the prevailing doctrine that foreign penalties as such are not recoverable in an original suit for the collection of taxes. 60 *N.J.* at 482. See also, *Restatement, Conflicts* 2d §129 (1969). This court fails to find in the record that the nominal penalty arose under a penal law or is of such a nature as to preclude suit to recover it outside of the Commonwealth. *Milwaukee Cty. v. M.E. White Co.,* 296 *U.S.* 268, 56 *S. Ct.* 229, 80 *L. Ed.* 220 (1935).

Appendix C

[12] Lastly, defendants ask this court to declare that the 35-year-old holding of *Kiker v. Philadelphia,* 346 *Pa.* 624, 31 *A. 2d* 289 (Sup. Ct. 1943), *cert.* den. 320 *U.S.* 741, 64 *S. Ct.* 41, 88 *L. Ed.* 439 (1943), is erroneous. *Kiker* upheld the power of the City of Philadelphia to levy and collect the wage tax on income earned by nonresidents employed on federal areas within city boundaries. This result has been followed ever since. *Lang v. Philadelphia,* 31 *Pa. Cmwlth.* 537, 377 *A. 2d* 849 (Cmwlth. Ct. 1977), app. dism. ____ *U.S.* ____, 99 *S. Ct.* 59, 58 *L. Ed.* 2d 96 (1978); *Philadelphia v. Kenny, supra; Philadelphia v. Konacki,* 27 *Pa. Cmwlth.* 391, 336 *A. 2d* 608 (Cmwlth. Ct. 1976); *Application of Thompson,* 157 *F. Supp.* 93 (E.D. Pa. 1957) aff'd *sub nom. U.S. ex rel. Thompson v. Lennox,* 258 *F.* 2d 320 (3 Cir. 1958), *cert.* den. 358 *U.S.* 931, 79 *S. Ct.* 317, 3 *L. Ed.* 2d 303 (1959). Moreover, this court finds it lacks the jurisdiction to inquire into the power of Philadelphia to levy this tax, in an action on valid Pennsylvania judgments.

In *People of State of New York v. Coe,* 112 *N.J.L.* 536 (1934), the New Jersey Court of Errors and Appeals ruled that a New York judgment for taxes was entitled to full faith and credit. In so doing the court pointed out that questions of the construction and application of the New York tax laws were not the subject of litigation in New Jersey since they had been conclusively determined by the New York judgment which established the liability for the tax. *Id.* at 538. Likewise, in another proceeding to recover a tax in a foreign court, it was said:

> In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it [is] founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. [*Milwaukee Cty., supra,* 296 *U.S.* at 275, 56 *S. Ct.* at 233]

Consequently, this court concludes that it lacks the capacity in a full faith and credit enforcement proceeding to attach a different interpretation to the wage tax.

Having reviewed defendants' contentions and there existing no genuine issue of material fact, plaintiff's motion for summary judgment is granted, *R.* 4:46-2; *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 73-75 (1954), in the case of *Philadelphia v. Stadler; Philadelphia v. DiMartino and Philadelphia v. Sulpisie.*

In the case of *Philadelphia v. Sproules,* also consolidated for disposition on motion, it appears that Sproules actually appeared and defended in the Philadelphia Court of Common Pleas. No issue was raised as to his nonreceipt of a notice of administrative remedy and Sproules, like Bullion, lost on the merits. As to him, on this motion, counsel raises only the public policy arguments in defense of the application for summary judgment. For the same reasons as given *supra,* that argument is rejected and summary judgment is allowed in favor of the city.

Defendants contend this rule precludes *pro se* nonresident defendants from appearing in the Philadelphia Commonwealth Courts. This court disagrees with that interpretation. The rule on its face only requires that a party to a lawsuit list an address within the Commonwealth. It does not exclude a nonresident litigant from making his appearance. In these matters defendants could have provided a mailing address within the city since they worked on installations clearly within its boundaries. No authority has been presented to this court which holds that the Pennsylvania courts deny access to the court for failure to comply with the above-cited rule. Nor did defendants make any effort whatsoever to appear. Therefore, no shred of evidence supports the theory that this rule is violative of the Fourteenth Amendment.

Appendix C

The last due process argument utilized by defendants to resist enforcement of the Pennsylvania judgments is that they lacked sufficient minimal contacts with Pennsylvania to satisfy due process under the test announced in *International Shoe Co. v. Washington,* 326 *U.S.* 310, 66 *S. Ct.* 154, 90 *L. Ed.* 95 (1945). In the Pennsylvania proceedings, service pursuant to the long arm statute, 42 *Pa. C.S.A.* §8301 *et seq.,* was invoked on the theory that §8304 thereof permits service in the manner described on nonresidents who "shall have done any business" in Pennsylvania. For purposes of this statute, working in Philadelphia is "doing business" there under the definition of that phrase given in 42 *Pa. C.S.A.* §8309. *Philadelphia v. Bullion,* 28 *Pa. Cmwlth.* 485, 368 *A. 2d* 1375 (Cmwlth. Ct. 1977). This court is bound by that interpretation for "where the construction of a foreign statute is involved, our courts will accept as controlling the interpretation placed thereon by the courts of that state." *King v. Klemp,* 26 *N.J. Misc.* 140, 145, 57 *A. 2d* 530, 533 (Ch. 1947); *Watson v. Lane,* 52 *N.J.L.* 550 (E. & A. 1890); 73 *Am Jur. 2d, Statutes,* §143 (1974).

[6] In *Bullion* facts identical to those in the present case were involved except: (1) defendant conceded employment in Philadelphia and (2) appeared in Pennsylvania to contest service under the long arm statute. He lost. Consequently, the only avenue of inquiry open to the court is whether merely working in Pennsylvania satisfies the constitutional requirement of minimal contacts to give it long arm jurisdiction over New Jersey residents consistent with due process. *International Shoe, supra, McGee v. International Life Ins. Co.,* 355 *U.S.* 220, 78 *S. Ct.* 199, 2 *L. Ed.* 2d 223 (1957); *Hanson v. Denckla,* 357 *U.S.* 235, 78 *S. Ct.* 1228, 2 *L. Ed.* 2d 1283 (1958). The central concern of the inquiry into personal jurisdiction has become the relationships among defendant, the forum and the litigation rather than the mutually exclusive sovereignty of the states on

which the rules of *Pennoyer v. Neff*, 95 *U.S.* 714, 24 *L. Ed.* 565 (1877), were based. *Shaffer v. Heitner*, 433 *U.S.* 186, 188, 97 *S. Ct.* 2569, 2571, 53 *L. Ed.* 2d 683, 685 (1977). Even before *Shaffer*, our own Supreme Court answered the question posed above. In *J.W. Sparks and Co. v. Gallos*, 47 *N.J.* 295 (1966), defendant, a New Jersey resident, purchased stock via telephone through a New York broker with an office in New Jersey and the court held defendant had "purposefully avail[ed] [him]self of the privilege of conducting activities within the forum state" and thus it could be said that he invoked "the benefits and protections of its laws." The court then reversed a county district court holding disallowing a New Jersey judgment based upon a New York default judgment secured after service in New Jersey under New York's long arm statute. If a single stock purchase, where defendant buyer never went to New York but merely used a New York agent, is sufficient "minimal contact," clearly years of continuous employment in Philadelphia with all its attendant use of streets, police service and other amenities is clearly contact with Pennsylvania sufficient to satisy traditional concepts of fair play in requiring these defendants to respond to actions arising out of such employment in Pennsylvania. *McGee, supra; Hanson, supra; J.W. Sparks, supra; Avdel Corp. v. McCure*, 58 *N.J.* 264 (1971).

[7] Defendant next argues that the public policy of New Jersey forbids enforcement of the Pennsylvania judgment. Although full faith and credit may on rare occasions give way to the policy of enforcing state, *Restatement, Conflicts* 2d, §103 (1969), such an exception has an extremely narrow application. In fact, it has been said that there are no exceptions in the case of a money judgment rendered in a civil action by the courts of another state. *Zelek v. Brosseaus*, 47 *N.J. Super.* 521, 533 (App. Div. 1957), aff'd 26 *N.J.* 501 (1958). See also, *Magnolia Petroleum Co. v. Hunt*, 320 *U.S.* 430, 64 *S. Ct.* 208, 88 *L. Ed.*

149 (1943), reh. den. 321 *U.S.* 801, 64 *S. Ct.* 483, 88 *L. Ed.* 1088 (1944). In *Milwaukee Cty. v. M.E. White Co.*, 296 *U.S.* 268, 56 *S. Ct.* 229, 80 *L. Ed.* 220 (1935), Mr. Justice Stone succinctly summarized the full faith and credit clause and its function in a federalist system:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of its origin. [at 276-277, 56 *S. Ct.* at 234]

[8] It is the contention of defendants that the public policy of the State of New Jersey is so undividedly opposed to the imposition of the wage tax that the courts of New Jersey should not enforce a judgment for its collection. Such policy, defendants argue, is manifested in two Assembly bills, Assembly Concurr. Resolu. 118 (February 15, 1974) and Assembly Resolu. 16 (May 17, 1974), and the Attorney General's appearance *amicus curiae in Non-Resident Taxpayers Ass'n v. Munic. of Philadelphia,* 341 *F. Supp.* 1135 (D.N.J. 1872), aff'd 478 *F.* 2d 456 (3 Cir. 1973). Admittedly, these materials reveal an earnest dislike for the imposition of the wage tax upon all New Jersey residents working within the city, but to base a denial of full faith and credit on such an expression would be to revive the status of the several states as "independent foreign sovereignties, each free to ignore obligations . . . of the others." *Milwaukee Cty., supra,* 296 *U.S.* at 276, 56 *S. Ct.* at 234.

Appendix C

[9, 10] New Jersey recognizes tax actions of foreign states, *N.J.S.A.* 54:8A-46(b), in its courts. More importantly, *Restatement, Conflicts* 2d §117 (1971), provides:

> A valid judgment rendered in one state of the United States will be recognized and enforced in a sister state even though the strong public policy of the latter state would have precluded recovery in its courts on the original claim.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1226

HENRY STADLER,

Petitioner,

vs.

CITY OF PHILADELPHIA,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari To the Supreme Court of New Jersey

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OPINION BELOW

Respondent accepts Petitioner's description of the opinions of the courts below.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Where provisions of the Philadelphia Code furnish an aggrieved taxpayer with an opportunity to be heard through an appeal to an administrative agency and then to a court of record from an adverse decision thereof and where said code provided that this is the exclusive procedure by which a challenge to a tax determination may be asserted, is Petitioner denied due process where, after notice of his rights to pursue this remedy, and failure to do so, he is denied an opportunity to raise in a subsequent action for collection of the tax, any defense which could have been raised before the agency?

2. Did a Philadelphia Rule of Civil Procedure, as constituted at the time Respondent commenced its cause of action against Petitioner violate Petitioner's right to procedural due process by requiring him to provide an address within the Commonwealth at which he could be served, where the record does not support any proposition that Petitioner attempted to file any document notwithstanding the foregoing rule or that Petitioner even knew of the existence thereof at that time.

COUNTER-STATEMENT OF THE CASE

Petitioner, a resident of New Jersey, is employed by the federal government on a federal enclave within the City of Philadelphia. Respondent assessed its wage tax against Petitioner after he failed to voluntarily self-assess the tax as required by law. Petitioner did not contest said assessment before the Tax Review Board. Respondent commenced an action in assumpsit against Petitioner in the Court of Common Pleas of Philadelphia. No Answer having been filed, Respondent obtained a default judgment against Petitioner.

Respondent then sought to enforce its judgment through the courts of New Jersey pursuant to the Full Faith and Credit Clause of the United States Constitution, Art. IV. §1. Respondent obtained a summary judgment in the Burlington County District Court. That decision was appealed to the New Jersey Superior Court, Appellate Division, which affirmed the lower court decision. The New Jersey Supreme Court denied Petitioner's Petition for Certification.

The constitutional issue that notice of a taxpayer's appeal rights, printed on the reverse side of the assessment notice, was not statutorily authorized and hence is invalid as notice was initially raised before the Burlington County District Court but then abandoned by Petitioner. See Petition Appendix "C".

The constitutional issue that Petitioner was denied procedural due process by being required to provide an address within the Commonwealth at which he could be served was properly raised and pursued in the courts below.

REASONS FOR DENYING THE WRIT

Petitioner was not denied procedural due process by being deprived of the right to notice and the opportunity to be heard.

1. The provisions of the Philadelphia Code which furnish an aggrieved taxpayer with an opportunity to be heard through an appeal to an administrative agency and then to a court of record from an adverse decision thereof, and which provide that this is the exclusive procedure by which a challenge to a tax determination may be asserted, do not deprive the Petitioner his right to due process where, after notice of his right to pursue this remedy and failure to do so, he is denied an opportunity to raise in a subsequent action for collection of the tax, any defense which could have been raised before the agency.

Petitioner's argument, when distilled to its essence, is that a taxpayer who has not yet subjected himself to *in personam* jurisdiction of a court, cannot be required to assert his defenses to the assessment before the Tax Review Board at the risk of being precluded from raising them in a judicial forum by the requirement that he exhaust his administrative remedies at the agency level. Further, he would argue there must be a legislative basis for service upon a taxpayer of the assessment and the absence of same falls short of the constitutional requisite for notice despite the receipt of actual notice of appeal rights on the reverse side of the assessment bill.

Full faith and credit must be accorded the judgment of a sister state as long as the judgment was obtained without fraud or as the result of want of jurisdiction over the subject matter or the parties. *Matter of Neuwirth Estate,* 155 N.J. Super. 410, 382 A.2d 972 (1978). The

litigation is conclusive of rights of the parties in every other court as in the court where judgment was entered, even if the judgment was obtained by default. *DeGroot, Kalliel, Traint & Conklin, P.C. v. Camarota,* 169 N.J. Super. 338, 404 A.2d 1211 (1979). See also *City of Philadelphia v. Smith,* 169 N.J. Super. 156, 404 A.2d 360 (1979).

This Court should not consider Petitioner's contention that he was denied notice and the opportunity to be heard in the courts of Pennsylvania, inasmuch as he abandoned that argument before the Burlington County District Court after initially raising it. See Footnote 2 of that court's opinion (which is found in Petition, Appendix "C"). Petitioner should be considered to have waived this contention due to his failure to pursue it. Under New Jersey law, a reviewing court would be limited to address the issues considered below and not what was outside the appeal record. *Passaic County Retail Liquor Dealer's Assn. v. Board of Alcoholic Beverages Control,* 137 N.J. Super. 187, 117 A.2d 147 (1955). Absent compelling reasons, appellate courts of that state decline to consider questions not properly presented at the trial level when the opportunity for such presentation was available. *Housing Authority of City of Newark v. Sagner,* 142 N.J. Super. 332, 361 A.2d 565 (1976).

Assuming *arguendo* that Petitioner did not waive the contention he now asserts, the issue as to the purported violation of his rights to due process must be addressed. In essence, the allegation of deprivation of such rights is that notice and the opportunity to be heard must accrue at a time not before *in personam* jurisdiction attaches to the taxpayer and that since he is required to set forth his defenses to a determination of tax delinquency by filing a petition for review with the Tax Review Board within sixty

days thereof, Philadelphia Code, §1702(1),[1] he is denied due process inasmuch as the doctrine of exhaustion of administrative remedies precludes the raising of defenses later before the court. A second issue he raises is that no statutory basis exists for notice by the mailing of assessment billings to taxpayers and that since the sending of such notice is "gratuitous" and "pursuant to the internal policy" of the Department of Revenue of the City of Philadelphia, such procedure is outside the mandate of legislative authority.

That the failure of a taxpayer to exhaust his administrative remedies before the Tax Review Board precludes his raising the defense of unconstitutionality of the tax as applied to him, was decided by the Commonwealth Court of Pennsylvania in *City of Philadelphia v. Kenny*, 28 Commonwealth Court, 531, 369 A.2d 1343 (1977), *allocatur denied; cert. denied*, 434 U.S. 923, *reh. denied*, 434 U.S. 1025. While that opinion did not address the issue of procedural due process, it clearly held that nonresident federal workers employed on federal enclaves within Philadelphia must contest the wage tax, if at all, by filing a petition for review with the Tax Review Board so as to provide for the development of a factual record at the agency level. The Board could then apply those facts to the defenses raised and, subject to judicial review, determine the legal issues raised.

Respondent concedes that if this Court determines that Petitioner was denied his constitutional rights to notice

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1. *Philadelphia Code, §19-1702. Petitions for Review.*

Every petition for review of any decision or determination relating to the liability of any person for any unpaid money or claim collectible by the Department of Collections including, but not limited to, any tax, water or sewer rent, license fee or other charge, and interest and penalties thereon, shall be filed with the Tax Review Board within 60 days after the mailing of a notice of such decision or determination to the petitioner.

and the opportunity to be heard regarding a challenge to the assessment, the doctrine of exhaustion of administrative remedies would not have precluded him from raising such an issue in the Court of Common Pleas of Philadelphia without first having appeared before the Tax Review Board. However, it will be demonstrated that the Philadelphia Tax Code's mechanism for contesting a tax determination does not violate petitioner's due process rights and so the courts of New Jersey properly accorded full faith and credit to the judgment obtained in Pennsylvania.

The State of New Jersey has enacted a similar procedural mechanism for the assessment and collection of taxes, the notice requirements of which have been determined to comport with due process rights.

N.J.S.A. 54:3-21,[2] provides that an aggrieved taxpayer who contests an assessment must appeal to the appropriate county board of taxation on or before August 15 of each

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2. New Jersey Statutes Annotated.

54:3-21. Appeals by taxpayers; by taxing district; petition

A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the country, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district or by the assessed valuation of property in another district in the county, may on or before August fifteenth appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the assessor, clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal. As amended L. 1945, c. 125, p. 479 §1.

year. *N.J.S.A.* 54:3-22 [3] sets forth the requirement that the board shall hear and determine said appeal. While there is no specific method of notice required in that tax code, notice by mail has been considered sufficient. *Jersey City v. Division of Tax Appeals in State Dept. of Taxation and Finance,* 5 N.J. Super. 375, 69 A.2d 331 (1949), *aff'd* 5 N.J. 433, 75 A.2d 865. In that case, the taxpayers argued that the absence of a notice provision denied due process. The court responded to this argument by conceding that if the giving of notice were a matter of grace or were left to the discretion of the city or tax board, this contention would probably be correct, citing *Wuchter v. Pizzutti,* 276 U.S. 13 (1928). However, inasmuch as the code does expressly mandate a hearing, it ruled that the requirement of notice is imported into the statute by judicial intendment.

Similarly, under the Philadelphia Code, no specific notice provision, much less anything approaching the requirement for service of process is to be found at the agency

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3. New Jersey Statutes Annotated.

54:3-22 Hearing of appeals; witnesses; evidence

The board shall thereupon make such order respecting the time and manner for hearing the appeal as it may deem just, and shall summarily hear and determine the appeal, and revise and correct the assessment in accordance with the value prescribed by law. All appeals filed pursuant to the provisions of chapter 3 of Title 54 of the Revised Statutes shall be heard and determined by the board. It may compel the attendance of witnesses, the production of books and papers before it, examine witnesses or cause witnesses to be examined under oath before it, which oath may be administered by a member of the board. In any proceeding before the board where deeds or other instruments of conveyance do not state the true consideration or sale price of the property, which is the subject of appeal, the United States documentary stamps attached, if any, to such deeds or instruments as well as recitals in such deed or in other instruments of record with respect to such property shall be admitted as *prima facie* evidence of the true consideration or sales price of the said property. As amended L. 1946, c. 161, p. 730 §17; L. 1960 c. 51, p—, §22.

level at which a taxpayer is given the opportunity to contest an assessment.

The New Jersey enactment has, like that in Philadelphia, see *City of Philadelphia v. Kenny, supra,* and *City of Philadelphia v. Sam Bobman Department Store Co.,* 189 Pa. Super. 72, 149 A.2d 578 (1959), been interpreted to require an appeal at the administrative level to be a condition precedent to the raising of meritorious defenses in a judicial forum. *Pleasantville Taxpayers v. City of Pleasantville,* 111 N.J. Super. 377, 268 A.2d 342 (1970), *aff'd* 115 N.J. Super. 85, 278 A.2d 229.

The New Jersey tax code, has been determined to pass constitutional muster pertaining to notice and the opportunity to be heard. It does not provide that a taxing authority possess *in personam* jurisdiction over a taxpayer at the time he is required to make his defenses to an assessment at the risk of precluding him from raising them in a judicial forum under the doctrine of exhaustion of administrative remedies. Further, like its counterpart in Philadelphia, the New Jersey statute has no specific notice provision, but rather notice is required as a matter of judicial intendment inasmuch as the code provides for a hearing upon the challenged assessment.

Petitioner also argues that full faith and credit may not be given in connection with the enforcement of foreign tax judgments "automatically entered". *N.Y. Susquehanna v. Vermeulen,* 44 N.J. 491 (1965).[4]

However, in that case, the procedure applicable to the enforcement of the Railroad Tax Law provided for the

4. The court held the requirements of due process were satisfied despite the *ex parte* entry of the judgment since the statute provided that its entry was without prejudice to the taxpayer's right of appeal.

State Comptroller to issue to the Clerk of the Superior Court a certificate specifying the amount of unpaid taxes, said certificate being then docketed as a judgment against the taxpayer.

Under the configuration of the Philadelphia Tax Code, no judgment is entered against a taxpayer as the result of an assessment. Nor may any judgment be docketed as the result of the failure to timely appeal to the Tax Review Board. As was done in the matter *sub judice,* upon the failure of taxpayer to pay the amount of taxes assessed or to contest the assessment before the Tax Review Board, the City of Philadelphia filed a Complaint in the Court of Common Pleas. After service thereof, Petitioner failed to answer the Complaint. Consequently, a default judgment was taken against him.

In view of the Petitioner's failure to file a petition for review before the Tax Review Board and his failure to file an Answer to Respondent's Complaint in the Court of Common Pleas, his cry of deprivation of the right to procedural due process must fall on deaf ears.

2. Philadelphia Rule of Civil Procedure 306, as constituted at the time Respondent commenced a cause of action against Petitioner did not violate Petitioner's right to procedural due process by requiring him to provide an address within the Commonwealth at which he could be served, inasmuch as the record does not support any proposition that Petitioner attempted to file any document, notwithstanding the foregoing rule or that Petitioner ever knew of its existence at that time.

Philadelphia Rule of Civil Procedure 306 then provided as follows:

> "The first paper filed by a party in a case shall have endorsed thereon an address in the Commonwealth

> at which all papers and notices thereafter may be served upon him, and the Prothonotary shall not accept filing unless it contains such endorsement."

Petitioner contends he was subjected to a violation of his right of procedural due process inasmuch as the above cited rule prohibited him from making a defense to an action brought against him in the Court of Common Pleas of Philadelphia for failure to pay his wage tax. Petitioner cites no precedent to buttress his contention of unconstitutionality. Other than postulating that "the denial of constitutional rights (is) patent and obvious", he merely refers to the general proposition, with which Respondent would agree, that a judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. *Griffin v. Griffin*, 327 U.S. 220 (1946).

Petitioner would have this Court find that the rule in effect at the time he was served with the Complaint was unconstitutional, from the supposition that since the rule was later amended to allow the use of an address outside the Commonwealth for nonresident defendants appearing *pro se*, the rule prior to amendment must have been violative of his constitutional rights.

This assertion, unsupported by any precedent which bears directly or analogously on the constitutional issue he raises, represents the proverbial grasping at straws to which so many nonresident federal employees in Philadelphia have so often turned in their attempt to avoid payment of the City wage tax.

Petitioner raised this issue before the District Court in New Jersey, through which Respondent sought to enforce its Pennsylvania judgment. In its opinion, the court ex-

pressed disagreement with the contention that Petitioner was prevented from appearing in court in Philadelphia, a position which Respondent wholeheartedly adopts:

> "It (Rule 306) does not exclude a nonresident litigant from making his appearance. In these matters defendants could have provided a mailing address within the city since they worked on installations clearly within its boundaries. No authority has been presented to this court which holds that the Pennsylvania courts deny access to the court for failure to comply with the above cited rule. Nor did defendants make any effort whatsoever to appear. Therefore, no shred of evidence supports the theory that this rule is violative of the Fourteenth Amendment."

Furthermore, the record is devoid of any evidence supporting the proposition that Petitioner attempted to file a document with the court and was precluded from so doing by the application of *Rule* 306. Nor is there to be found in the record an indication that Petitioner was even aware of the existence of such a rule. After service of the Complaint, the twenty day period permitted for answering lapsed without any effort on Petitioner's behalf to respond. The assertion of a denial of due process on the basis of a rule which went untested by Petitioner cannot rise to a valid attack on its constitutionality.

Consequently, inasmuch as Petitioner has provided no basis upon which to support his contention that the rule violated his right to due process, his Petition for Writ of Certiorari should be denied.

CONCLUSION

It is respectfully submitted that for the reasons set forth in this brief, this Honorable Court should not grant Petitioner's request for review of the decisions of the Courts of New Jersey.

WHEREFORE, it is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of New Jersey filed by Petitioner herein be denied.

Respectfully submitted,
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City Solicitor

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